Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN HARRIS,

Petitioner,

v.

CITY OF AKRON, GREG BURGOON, JOHN HYMES, and JOHN DOE(S),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the determination of whether there was an actual emergency that justified the decision to immediately demolish a building without providing the owner any predeprivation process rest completely within the judgment of city building officials and thus permit entry of summary judgment against the building's owner in a §1983 procedural due process case despite the conclusion of the court of appeals that there were genuine factual issues as to the existence of such an emergency?

2. Whether a state that grants its political subdivisions statutory immunity from inverse condemnation suits meets its duty to provide adequate postdeprivation remedies to property owners whose buildings are subjected to immediate demolition without any predeprivation process because of alleged emergencies?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the grant of summary judgment to the respondents (App. 1-18) is reported as *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994). The report of the magistrate judge recommending that respondents' motion for summary judgment be granted in part and denied in part (App. 27-42) is not reported. The opinion of the district court judge granting respondents' motion for summary judgment in its entirety (App. 20-26) is not reported.

JURISDICTION

The opinion and judgment of the court of appeals were issued on April 6, 1994. A timely petition for rehearing was filed by petitioner on April 20, 1994 and denied on April 29, 1994. App. 19. On July 18, 1994, Justice John Paul Stevens signed an order extending the time for filing a petition for a writ of certiorari to September 26, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Ohio Political Division Tort Liability Act provides as follows:

§2744.02(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

* * *

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the

political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:

* * *

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention,

workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The facts in this case, taken verbatim from the opinion of the United States Court of Appeals for the Sixth Circuit, are as follows:[1]

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1 To avoid presenting a lengthy record to this Court at this stage of these proceedings and to minimize any collateral disputes about the facts, petitioner's summary of the facts in the Statement of the Case relies almost exclusively on the discussion of the uncontested facts in the opinion of the court of appeals.

On July 17, 1990, at about 11:30 a.m., the City of Akron Building Inspection Office received a call from Ohio Edison Company, an electric utility, informing it of a potential building hazard at 488 Wooster Avenue in Akron. The defendant John Hymes, chief building inspector, sent defendant Greg Burgoon, Akron's superintendent of building, to the reported location to investigate. Burgoon found a two story brick building that he believed was dangerously close to falling onto Wooster Avenue and a neighboring occupied home. The upper east wall of the building had moved inward four to five feet, and he thought the roof was collapsing.[2]

Burgoon immediately called Hymes, who drove to the Wooster Avenue site to make a personal inspection of the building. After examining the building Hymes determined that an emergency demolition was necessary, as provided by Akron City Code §190.705:

> *Emergency Work*
>
> In case there shall be, in the opinion of the Superintendent of Building Inspection, actual and immediate danger of failure or collapse of a building or structure or any part thereof so as to endanger life or property, he shall cause the necessary work

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2 In the proceedings below it was uncontested that the occupied home was on the west side of petitioner's building and not on the east side, which is the side that had moved inward. Thus, petitioner disputed the claim that the condition of his building posed a danger to any occupied building.

> to be done to render the building or structure or part thereof temporarily safe. If the building or structure is in such a state of decay that it is impracticable to be repaired, he may order the building or structure razed or demolished.

The city placed a call to the owner of the building, plaintiff John Harris. Unfortunately, Harris was not at his office; Hymes left an emergency message with Harris' secretary to call the Building Inspection Office immediately. Jim Gardner of the Akron Building Department also contacted Steve Nome, Supervisor of Sanitarians and acquaintance of John Harris, in an attempt to locate Harris. Nome advised Gardner of two alternative addresses where Harris might be found. In fact, Harris was present at one of the two addresses provided by Nome, but no one attempted to contact him at either address.

Instead, Hymes decided that the condition of the building required immediate action, and initiated plans to destroy the building partially. Bids were hastily made, and the emergency demolition began at 4:10 p.m. on July 17, the same day that the damage to the building was reported to the building department. Although Hymes originally planned to remove only the second story of the building, he felt that the entire structure became unstable after a few blows from a wrecking ball and thus he decided to raze the entire building.

The owner, Harris, was using the Wooster Avenue building as a storage warehouse for various materials when it was destroyed. After the demolition, Harris hired an expert in construction and building diagnostics, Jack Bergson, to make an analysis of the building department's decision to

destroy the building. Bergson prepared a lengthy affidavit after reading the depositions of Nome, Hymes, Gardner and Burgoon and other documents pertaining to the demolition, viewing photographs in the Akron City Building Department purporting to show the condition of the Harris building before, during and after demolition, and making an on-site inspection of the lot where the building had stood. The plaintiff filed this affidavit in opposition to the defendants' motion for summary judgment.

In his affidavit Bergson stated that the city officials made their decision without ever entering the building or viewing the roof from any point other than ground level. Their hasty decision was made, according to Bergson, based on a "examination of the building [that] did not remotely meet minimum standards for ascertaining structural worthiness."

The affidavit then described in detail readily available techniques by which the true condition of an apparently damaged building can be determined. Examples of methods for learning the actual condition of a roof without risking injury are use of mirrors from a step ladder and use of an elevated bucket called a "cherry picker." With respect to the wall that appeared to have moved, Bergson stated that temporary support by shoring is frequently used while a more complete inspection takes place. To protect the public during shoring and inspection, the city could have erected a temporary canopy over the sidewalk. Bergson's affidavit stated that the city had the necessary materials available to make this more thorough inspection.

Based on his study of the photographs and documents, Bergson stated in his affidavit that there was no evidence that the roof was collapsing

> when the demolition order was given. Further, he stated his opinion that the basis upon which Burgoon gave the order for total demolition of the building was flawed. The affidavit disputed Burgoon's basis for finding that the building's reaction to efforts at partial destruction indicated that it was on the verge of a total collapse. Bergson pointed to contradictions in statements of various city officials as to the significance of several facts on which Burgoon relied for his final decision, and gave his opinion of the conclusions properly to have been drawn from the existence of these conditions.

App. 2-4.

The Second Amended Complaint filed by petitioner John Harris sought damages under 42 U.S.C. §§1983 and §1985(3) from the City of Akron and two city building officials. Petitioner alleged a taking of property without just compensation, a deprivation of property without due process, and a denial of equal protection.

The respondents filed a motion to dismiss or, in the alternative, for summary judgment. The district court judge referred the matter to a magistrate judge. In his report, the magistrate judge recommended dismissal of the taking claim as premature (App. 33-35) and dismissal of the §1985(3) claim for failure to contain required allegations of racial or other class-based discrimination. App. 40-41. The magistrate judge also recommended that the balance of respondents' motion for summary judgment be denied and that petitioner be permitted to litigate his due process and equal protection claims. App. 35-38 & 42.

In recommending dismissal of petitioner's taking claim because as premature, the magistrate judge found that "there is an adequate state remedy for governmental action in razing structures," relying on the Ohio Supreme Court case of *Solly v. City of Toledo*, 218 N.E.2d 463, 466 (Ohio 1966). App. 34-35.

The respondents had argued to the magistrate judge that they were shielded from liability under state law by Ohio Revised Code Ch. 2744. App. 41. The magistrate judge, however, did not independently consider the adequacy of the state postdeprivation remedy for purposes of the procedural due process inquiry in light of his recommendation to deny respondents' motion for summary judgment because of disputed factual issues as to the existence of an actual emergency.

With respect to petitioner's procedural due process claim, the magistrate judge relied on *Zinermon v. Burch*, 494 U.S. 113 (1990), to conclude that *Parratt v. Taylor*, 451 U.S. 527 (1981), was inapplicable. The magistrate judge then recognized that in certain circumstances the necessity of quick action could make a predeprivation remedy unnecessary and a postdperivation remedy constitutionally adequate. App. 37. Nonetheless, the magistrate judge relied on the presence of a factual dispute concerning whether immediate action was required and, finding this to be a material factual issue, recommended denial of respondents' motion for summary judgment on petitioner's procedural due process claim. App. 38.

The district court agreed with the recommendation of the magistrate judge to dismiss petitioner's taking claim, but the court concluded that respondents were entitled to have the due process and equal protection

claims dismissed as well.[3] Accordingly, the district court granted summary judgment in favor of the respondents on all claims. App. 26.

With respect to the procedural due process claim, the district court concluded that petitioner was seeking damages for a random and unauthorized act of city officials but that recovery was foreclosed by *Parratt v. Taylor*, 451 U.S. 527 (1981), because the petitioner "failed to prove the lack of adequate post-deprivation remedies . . . ." App. 25.[4]

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3 The magistrate judge had recommended denial of the motion for summary judgment on petitioner's equal protection claim because of the failure of respondents to challenge this claim. App. 42. The district court, however, dismissed the equal protection claim, (App. 26) and petitioner did not appeal this dismissal.

4 The district court noted that petitioner had not pleaded the inadequacy of the state remedies. App. 25. Such a pleading requirement, however, is not jurisdictional, and we have long passed the point in time in which pleading defects on legal issues (i.e., the legal adequacy of state remedies) control future proceedings. Moreover, the magistrate judge and the court of appeals addressed the adequacy of state postdeprivation remedies, although the former did so in the course of the discussion of the taking claim. Finally, respondents argued to the magistrate judge that they were shielded from state tort liability under Ohio Revised Code Ch. 2744, (App. 41) and they should not be permitted to switch positions and now argue that state postdeprivation remedies are available and adequate.

The court of appeals,[5] relying on the standards developed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Zinermon v. Burch*, 494 U.S. 113 (1990)(App. 10), rejected the reasoning of the district court and concluded that "[t]he district court erred in treating the plaintiff's procedural due process as one for deprivation of property by reason of a random and unauthorized act of a government official." App. 13. Rather, the court of appeals viewed this case as involving a challenge to acts taken by respondents under their established procedures. App. 13.

Nonetheless, the court of appeals distinguished *Zinermon* from the case at bar. In *Zinermon*, the court of appeals reasoned, the state officials could have hospitalized Burch immediately either by using the voluntary or the involuntary procedures. But in the present case, the court of appeals concluded that respondents did not have any available options.

> No such option was available to the Akron officials. If an emergency existed, the only available course of action for removing the threat to public health and safety was to carry out the demolition forthwith. Under these circumstances, there was no opportunity for notice and a predeprivation process. An erroneous determination that no emergency existed would have resulted in the very threat to the public that the code was intended to prevent. Thus, if there was an actual emergency, unlike in *Zinermon*, the

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5 Given the fact that this petition is based only on petitioner's procedural due process claim, this discussion of the opinion of the court of appeals is limited to that claim.

> authorities in this case could remove that emergency only by destroying the building. Following the non-emergency procedure of code §190.702 would have left the emergency untreated and the public exposed to the resulting danger.

App. 15.

The court of appeals then read Akron City Code §190.705 as leaving the determination of whether an emergency existed completely within the judgment of city building officials.

> Code §190.705 leaves the determination of whether an emergency existed on July 17 completely within the judgment of the superintendent of building inspection. . . . Regardless of whether the official's conclusion as to the existence of an emergency was correct or not, the unchallenged code section placed him in a position where there was "necessity of quick action." . . . . Under these circumstances, it was impracticable to wait for a predeprivation process to run its course. The availability of a meaningful postdeprivation process "by which to assess the propriety of the [city's] action at some time after the initial taking" satisfied the requirements of procedural due process.

App. 15-16 (quoting *Parratt*, 451 U.S. at 539).

In the court of appeals petitioner argued, as he had in the district court, that there was an unresolved material factual issue as to whether an emergency actually existed. App. 6. In response, the court of appeals acknowledged that there was a genuine issue of fact as to the existence of

an actual emergency, but the court held that this factual dispute was not material.

> The Bergson affidavit demonstrated the existence of a genuine issue of fact, but we conclude that no genuine issue of material fact existed in this case. With the authority of the decision makers unchallenged, the question of whether an emergency actually existed constituted nothing more than a question of whether they made the right decision. By attempting to show only that the defendants made the wrong decision, Harris in no sense attacked the constitutionality of the process by which that decision was reached.

App. 16.

In rejecting petitioner's procedural due process claim, the court of appeals made clear that its conclusion depended on the existence of an adequate state postdeprivation remedy. The respondents had argued that a state inverse condemnation action was an adequate postdeprivation remedy, (App. 8) and the court of appeals agreed, concluding that "[t]he state provided a meaningful postdeprivation process to determine the propriety of the demolition process." App. 16. Finally, the court identified the state remedy that it viewed as adequate--the inverse condemnation remedy.[6]

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6 The discussion of the court of appeals of the adequacy of state remedies came in the penultimate paragraph of its opinion in which in the course of a discussion of petitioner's taking claim the court commented on the existence of what it viewed as an adequate state remedy. This conclusion as to the adequacy of the state damage remedy is equally applicable to

> The plaintiff is not without a remedy, however. The district court, accepting the magistrate judge's recommendation, dismissed Harris' "taking" claim as premature; it did not decide that claim on the merits. The plaintiff may pursue his claim for damages in an inverse condemnation proceeding as recognized by the Ohio Supreme Court . . . . Only if that action fails to produce a remedy will the plaintiff have fulfilled the prerequisites for a Fifth Amendment claim based on a taking of his property without just compensation.

App. 18 (relying on *Solly v. City of Toledo*, 218 N.E.2d 463, 466 (Ohio 1966).

In so holding, the court of appeals did not consider the arguments made by respondents earlier in the litigation that Ohio Revised Code Ch. 2744 provided the city with statutory immunity from state law damage claims. App. 41. Nor did the court of appeals address petitioner's argument that the statutory immunity of political subdivisions under Ohio law made the state postdeprivation remedies inadequate.

Thus, the court of appeals affirmed the grant of summary judgment to the respondents on petitioner's §1983 procedural due process claim.

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the court's conclusion about the adequacy of petitioner's state remedies for purposes of the procedural due process claim.

REASONS FOR GRANTING THE PETITION

I. THE COMPLETE DEFERENCE OF THE COURT OF APPEALS TO THE CONCLUSION OF CITY BUILDING OFFICIALS AS TO THE EXISTENCE OF AN ACTUAL EMERGENCY THE PRESENCE OF WHICH WOULD HAVE JUSTIFIED THE IMMEDIATE DEMOLITION OF PETITIONER'S BUILDING WITHOUT ANY PREDEPRIVATION PROCESS IS INCONSISTENT WITH THIS COURT'S RECENT DECISION IN *WATERS V. CHURCHILL*, 114 S.CT. 1878 (1994).

The court of appeals found that there was a genuine factual dispute as to the existence of an actual emergency the presence of which would have justified the immediate demolition of petitioner's building without any predeprivation process. Nonetheless, the court held that this factual dispute was not material and that respondents were entitled to summary judgment on petitioner's procedural due process claim.

This decision gives government officials the sole and final word for determining the factual predicates for denials of life, liberty or property under the due process clauses of the fifth and fourteenth amendments without any predeprivation process whatsoever.

In cases of emergencies requiring executive urgency officials acting under color of state or federal law may deprive persons of rights protected under the fifth and fourteenth amendments without predeprivation process. *See, e.g., Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950)(summary seizure and destruction of drugs); *Fahey v. Mallonee*, 332 U.S. 245

(1947)(seizure of property of a bank based on substantial questions about the competence of the bank's management); *Stoehr v. Wallace*, 255 U.S. 239 (1921)(seizure of property believed to be enemy-owned during wartime); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908)(seizure of contaminated food). *See also Parratt v. Taylor*, 451 U.S. 527, 539 (1981)(collecting additional cases permitting the dispensation of predeprivation process in cases requiring quick governmental action).

Petitioner does not challenge this line of cases all of which involve a determination of what emergency conditions justify dispensing with predeprivation process. These decisions, however, contemplate the existence of bona fide emergencies requiring immediate action, and this Court has treated the determination of what constitutes an actual emergency as not resting on the unfettered discretion of government officials. For example, in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993), this Court held that an ex parte civil forfeiture of property alleged to have been used to commit or facilitate the commission of a federal drug offense could be reviewed under due process and that federal courts would not defer to law enforcement authorities in determining what constituted an extraordinary situation.

Unlike *James Daniel Good*, the present case deals with the *factual* predicates which, if found to exist, could justify dispensing with predeprivation procedural safeguards.

In *Waters v. Churchill*, 114 S.Ct. 1878 (1994), this Court addressed the issue of determining the accuracy of the factual basis on which governmental officials acted,

and a majority of the Court rejected complete deference to the factual determinations of such officials in the course of reviewing the constitutionality of their actions.[7] In concluding that the factual issues concerning the existence of an actual emergency were not material, however, the court of appeals in the present case deferred completely to the conclusions of city building officials as to the existence of an actual emergency the presence of which would have justified the immediate razing of petitioner's building without any predeprivation process. This complete deference is inconsistent with *Waters*.

Waters was a public employment free speech case, and one of the issues before this Court involved the question of whose view of the facts the courts were required to accept. The public employer had argued that the controlling version of the facts was the version upon which they relied in terminating the employee. The employee, on the other hand, argued (and the Seventh Circuit agreed) that the employer's conduct should be tested against the actual facts as subsequently determined by the factfinder.

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7 Although Justice O'Connor's opinion in *Waters* is a plurality opinion, Justices Stevens (joined by Justice Blackmun) made clear in their dissent that they would have gone further than the plurality in permitting the judicial factfinder to review the factual basis of the public employer's decision. Thus, it is proper for petitioner to refer to Justice O'Connor's opinion as the opinion of the Court and to treat *Waters* as holding that a court will not grant complete deference to the factual conclusions of public employers in subsequent reviews of the constitutionality of their actions.

In reversing the Seventh Circuit's judgment in *Waters*, this Court took a middle ground by refusing to permit the lower courts to apply the first amendment to the facts as determined by the judicial factfinder while also refusing to accord compete deference to the factual conclusions of the public employer. Instead, this Court required an examination of the reasonableness of the public employer's factual conclusions.

> [W]e do not believe that the court must apply the [applicable legal] . . . test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. Even in situations where courts have recognized the special expertise and special needs of certain decisionmakers, the deference to their conclusions has never been complete. . . . It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient.

Id. at 1889.

The court of appeals in the present case took a position similar to that advanced by the public employer in *Waters* by refusing to go behind the factual conclusion of city officials that an actual emergency existed. The petitioner contends, however, that, at a minimum, a court must review the reasonableness of what petitioner contends was respondents' mistaken belief as to the existence of such an emergency.

To be sure, *Waters* involved first amendment issues, but this Court has been equally unwilling to defer completely to the factual determinations of public decisionmakers in cases involving other issues. *See, e.g.*,

New Jersey v. T.L.O., 469 U.S. 325, 342-43 (1985)(search of students permitted if the search meets the test of reasonableness); *United States v. Leon*, 468 U.S. 897, 914 (1984)(refusing to treat deference to magistrate's determination as to probable cause as precluding judicial review of the determination).

Waters had not been decided when the court of appeals reached its decision in this case, but the complete deference of by the court of appeals to the conclusion of city building officials as to the existence of an emergency is inconsistent with this Court's approach to disputed factual issues *Waters*. Moreover, these questions are sufficiently substantial to justify this Court's use of its authority under S.Ct. Rule 16.1 to summarily grant the petition, vacate the judgment below, and remand for reconsideration in light of *Waters*.

II. THE DECISION BELOW RAISES AN IMPORTANT ISSUE OF FEDERAL LAW AS TO THE NEED FOR GOVERNMENT OFFICIALS TO HAVE A REASONABLE BASIS FOR A DECISION TO DISPENSE WITH PROCEDURAL SAFEGUARDS BEFORE DEPRIVING A PERSON OF THEIR PROPERTY.

This case raises an important issue of federal law. If public officials may rely on their unilateral view of the facts to find emergencies that justify the deprivation of protected interests without any predeprivation process, the door is open for wholesale abridgements of fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. To be sure, postdeprivation remedies are often available to make persons whole, but to remit persons to such postdeprivation state law remedies, even when adequate, leaves fundamental rights

at risk. This Court recognized in *Waters* that there must be some check on the reasonableness of what will sometimes be the mistaken beliefs of governmental officials in order to protect free speech. Likewise, this Court has recognized the importance of property rights, *see James Daniel Good*, 114 S.Ct. at 505 ("Individual freedom finds tangible expression in property rights."), and the potential abuse of protected rights require that there be some constitutional check. Thus, it is important that there be judicial scrutiny of the reasonableness of the factual determinations used to deny persons predeprivation due process.[8]

III. THE DECISION OF THE COURT OF APPEALS TREATING THE STATE INVERSE CONDEMNATION REMEDY AS AN ADEQUATE POSTDEPRIVATION REMEDY DESPITE THE STATUTORY IMMUNITY OF POLITICAL SUBDIVISIONS IN OHIO IS INCONSISTENT WITH THE PRINCIPLES ADOPTED BY THIS COURT IN *PARRATT V. TAYLOR*, 451 U.S. 527 (1981), AND RAISES IMPORTANT ISSUES OF FEDERAL LAW.

In permitting government officials to dispense with predeprivation due process in limited circumstances in which it is either impractical to provide prior hearings or where the need for emergency action makes prior hearings

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8 The review contemplated by *Waters* is only triggered when the factual determination of the public official is unreasonable. Moreover, the doctrine of qualified immunity provides public officials with additional protection in §1983 individual capacity suits, while the limited scope of §1983 municipal liability provide appropriate protection to political subdivisions.

inappropriate, this Court has always assumed that persons who were deprived of property or other protected interests would have adequate postdeprivation remedies.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court, in concluding that Nebraska provided an adequate postdeprivation remedy, pointed to the state tort claims procedure through which the plaintiff could have been "fully compensated . . . for the property loss he suffered." *Id.* at 544. Similarly, in *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court noted that the intentional deprivation of a prisoner's personal property could have been adequately compensated through the Virginia state remedy. The fact that the plaintiffs in *Parratt* and *Hudson* might not have recovered the full amount that they might have recovered under §1983 was not determinative of the adequacy of the remedy.

In the present case the court of appeals concluded that the petitioner had an adequate state inverse condemnation remedy under *Solly v. City of Toledo*, 218 N.E.2d 463, 466 (Ohio 1966). App. 18.

In reaching this conclusion, however, the court of appeals ignored the argument that respondents had made earlier in the litigation that Ohio Revised Code Ch. 2744 provided political subdivisions in Ohio with absolute statutory immunity in state damage suits of the type that petitioner had.

The Ohio Supreme Court in *Solly* had expressly left open the availability of governmental immunity in suits against political subdivisions for wrongful demolition of buildings. *See* 218 N.E.2d at 466 ("[i]f such officer was acting within the scope of his employment for a city in destroying the supposed nuisance, the city would be

liable under the doctrine of respondeat superior *unless protected by governmental immunity.*")(emphasis added). When *Solly* was decided, Ohio maintained a strict policy of governmental immunity, but the Ohio Supreme Court subsequently abrogated much of this immunity. *See Haverlack v. Portage Homes, Inc.*, 442 N.E.2d 749, 752 (Ohio 1982)(abrogating the doctrine of sovereign immunity for municipalities). That abrogation, in turn, was largely overturned by the Ohio General Assembly in 1985 when it adopted Ohio Revised Code Ch, 2744, the Ohio Political Subdivision Tort Liability Act, and restored most governmental immunity. *See generally* John A. Gleason & Kenneth Van Winkle Jr., *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity*, 55 U. Cin. L. Rev. 501 (1986).

Under Chapter 2744, governmental immunity political subdivisions were given absolute immunity from damage claims for action and inaction arising out of all governmental and proprietary activities except to the extent that such immunity was specifically waived under Ohio Rev. Code Ann. §2744.02(A)(1)("Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."). The Ohio Revised Code then enumerates those circumstances in which a political subdivision may be held liable for damages. *See* Ohio Rev. Code Ann. §2744.02(B), but the alleged erroneous determination that a building presents an emergency requiring immediate demolition is not a basis for a waiver of statutory immunity.

As the magistrate judge noted, the respondents "contend[ed] that they are shielded pursuant to Ohio Revised Code Chapter 2744 from state tort liability." App. 41.[9] Nonetheless, the district court and the court of appeals found the state postdeprivation remedies to be adequate and permitted the respondents to disown arguments that they had made earlier in the litigation.

The willingness of this Court to permit states to meet their obligation to provide procedural due process by relying on postdeprivation rather than predeprivation hearings should not become a trap for persons who are denied protected interests because of alleged emergencies. If the federal courts are not available to resolve disputes concerning the existence of claimed emergencies, they must be vigilant to assure that purported postdeprivation remedies are, in fact, available. The failure of the courts below to review Ohio law carefully and their willingness to treat the *Solly*/postdeprivation remedy as adequate has left the petitioner without any avenue for redress.

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9 Petitioner acknowledges that the courts below have treated the taking claim as premature because of the existence of state remedies that they viewed as adequate, relying on *Solly*. Although the adequacy of state compensation remedies is not before this Court for purposes of the taking claim that the petitioner did not appeal, the adequacy of state postdeprivation remedies is relevant to petitioner's procedural due process claim.

It is important for this Court to clarify the responsibility of lower courts in reviewing claims that depend on the existence of adequate state remedies. When governmental officials identify postdeprivation remedies that they claim are adequate, lower courts should carefully review the actual availability of such remedies, taking great care to determine if any immunity doctrines preclude relief.[10]

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10 If this Court accepts petitioner's suggestion and remands this case for reconsideration in light of *Waters*, petitioner also suggests this Court order, or at least suggest, that the court of appeals avail itself of Ohio's certification procedure, *see* Ohio Supreme Court Rules of Practice, Rule XVI, to obtain a definitive interpretation of Ohio law on the question of whether political subdivisions have statutory immunity from inverse condemnation or other suits challenging the wrongful demolition of buildings based on purported emergencies.

CONCLUSION

Pursuant to S.Ct. Rule 16.1 this Court should grant the petition for a writ of certiorari and vacate and remand the judgment and opinion of the court of appeals for further proceedings in light of *Waters v. Churchill*, 114 S.Ct. 1878 (1994). Alternatively, this Court should grant the petition for a writ of certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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September, 1994

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit (April 6, 1994).....App. 1

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing (April 29, 1994) .....App. 19

Memorandum Opinion of the United States District Court for the Northern District of Ohio (Dec. 12, 1992) .....App. 20

Report and Recommendation of Magistrate Judge, United States District Court for the Northern District of Ohio (April 20, 1991) .....App. 27

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

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No. 93-3056

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN HARRIS,
Plaintiff-Appellant,

v.

CITY OF AKRON, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

---

Decided and Filed April 6, 1994

Before: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. We must decide in this case whether the owner of real estate that was demolished by city officials is foreclosed from recovering damages in an action under 42 U.S.C. §1983 because of his failure to plead and prove that no adequate state law remedy existed by which he could pursue his claim. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984). The

district court granted summary judgment for the defendants, and we now affirm on different reasoning than that of the district court.

I.

Because our decision turns on determination of whether the plaintiff carried his burden of demonstrating the existence of a genuine issue of material fact, we recite the facts and prior proceedings in some detail.

A.

On July 17, 1990, at about 11:30 a.m., the City of Akron Building Inspection Office received a call from Ohio Edison Company, an electric utility, informing it of a potential building hazard at 488 Wooster Avenue in Akron. The defendant John Hymes, chief building inspector, sent defendant Greg Burgoon, Akron's superintendent of building, to the reported location to investigate. Burgoon found a two story brick building that he believed was dangerously close to falling onto Wooster Avenue and a neighboring occupied home. The upper east wall of the building had moved inward four to five feet, and he thought the roof was collapsing.

Burgoon immediately called Hymes, who drove to the Wooster Avenue site to make a personal inspection of the building. After examining the building Hymes determined that an emergency demolition was necessary, as provided by Akron City Code § 190.705:

> *Emergency Work*
>
> In case there shall be, in the opinion of the Superintendent of Building Inspection, actual and immediate danger of failure or collapse of a building or structure or any part thereof so as to endanger life or property, he shall cause the necessary work to be done to render the building or structure or part thereof temporarily safe. If the building or structure is in such a state of decay that it is impracticable to be repaired,

he may order the building or structure razed or demolished.

The city placed a call to the owner of the building, plaintiff John Harris. Unfortunately, Harris was not at his office; Hymes left an emergency message with Harris' secretary to call the Building Inspection Office immediately. Jim Gardner of the Akron Building Department also contacted Steve Nome, Supervisor of Sanitarians and acquaintance of John Harris, in an attempt to locate Harris. Nome advised Gardner of two alternative addresses where Harris might be found. In fact, Harris was present at one of the two addresses provided by Nome, but no one attempted to contact him at either address.

Instead, Hymes decided that the condition of the building required immediate action, and initiated plans to destroy the building partially. Bids were hastily made, and the emergency demolition began at 4:10 p.m. on July 17, the same day that the damage to the building was reported to the building department. Although Hymes originally planned to remove only the second story of the building, he felt that the entire structure became unstable after a few blows from a wrecking ball and thus he decided to raze the entire building.

The owner, Harris, was using the Wooster Avenue building as a storage warehouse for various materials when it was destroyed. After the demolition, Harris hired an expert in construction and building diagnostics, Jack Bergson, to make an analysis of the building department's decision to destroy the building. Bergson prepared a lengthy affidavit after reading the depositions of Nome, Hymes, Gardner and Burgoon and other documents pertaining to the demolition, viewing photographs in the Akron City Building Department purporting to show the condition of the Harris building before, during and after demolition, and making an on-site inspection of the lot where the building had stood. The plaintiff filed this affidavit in opposition to the defendants' motion for summary judgment.

In his affidavit Bergson stated that the city officials made their decision without ever entering the building or viewing the roof from any point other than ground level. Their hasty decision was made, according to Bergson, based on a "examination of the building [that] did not remotely meet minimum standards for ascertaining structural worthiness."

The affidavit then described in detail readily available techniques by which the true condition of an apparently damaged building can be determined. Examples of methods for learning the actual condition of a roof without risking injury are use of mirrors from a step ladder and use of an elevated bucket called a "cherry picker." With respect to the wall that appeared to have moved, Bergson stated that temporary support by shoring is frequently used while a more complete inspection takes place. To protect the public during shoring and inspection, the city could have erected a temporary canopy over the sidewalk. Bergson's affidavit stated that the city had the necessary materials available to make this more thorough inspection.

Based on his study of the photographs and documents, Bergson stated in his affidavit that there was no evidence that the roof was collapsing when the demolition order was given. Further, he stated his opinion that the basis upon which Burgoon gave the order for total demolition of the building was flawed. The affidavit disputed Burgoon's basis for finding that the building's reaction to efforts at partial destruction indicated that it was on the verge of a total collapse. Bergson pointed to contradictions in statements of various city officials as to the significance of several facts on which Burgoon relied for his final decision, and gave his opinion of the conclusions properly to have been drawn from the existence of these conditions.

B.

Harris originally filed a pro se suit, but ultimately hired an attorney who was permitted to file several amended complaints. In the second amended complaint Harris alleged the city deprived him of several constitutional rights by demolishing his building and sought damages under 42

U.S.C. §§1983 and 1985 plus attorney fees. Specifically, in his §1983 claim he alleged that the city and officials named as defendants, acting under color of state law, took his property for a public purpose without paying any compensation, in violation of the Fifth Amendment, and deprived him of his property without due process and denied him equal protection of the laws, in violation of the Fourteenth Amendment. His §1985 claim charged a conspiracy to deprive him of his property.

The defendants filed a motion to dismiss or, in the alternative, for summary judgment. The district judge referred the matter to a magistrate judge. In his report the magistrate judge recommended dismissing the Fifth Amendment claim as premature and the conspiracy claim for failing to contain required allegations of racial or other class-based discrimination. The magistrate judge recommended that the motion for summary judgment be denied and that the plaintiff be permitted to litigate the due process and equal protection claims.

The district court agreed with the recommendations respecting the Fifth Amendment and conspiracy claims, but concluded that the defendant was entitled to have the due process and equal protection claims dismissed as well. Accordingly, the district court granted summary judgment in favor of the defendants on all claims. The district court found that Harris had failed to satisfy the legal requirements for recovery on either his substantive due process claim or the equal protection claim. With respect to the procedural due process claim, the court found that the plaintiff was seeking recovery for a random and unauthorized act of city officials and that recovery was foreclosed because Harris had failed to plead and demonstrate that no state postdeprivation remedy adequate to compensate his loss existed.

II.

On appeal the plaintiff does not contest dismissal of the §1985 conspiracy claim or the equal protection claim. Although he does not contest the dismissal of the Fifth

Amendment "taking" claim directly, he does argue that his substantive due process claim incorporated elements of an unlawful taking of his property without just compensation. Nevertheless, on appeal Harris seeks reversal only on the ground that the district court erroneously granted summary judgment on his procedural and substantive due process claims.

A.

Harris maintains that the district court erroneously treated his action as one for damages suffered because of random and unauthorized acts of city officials. He points out that he has consistently contended that the individual defendants acted under an established procedure of the city. His procedural due process complaint is that the defendants failed to give him notice of their intent to destroy his building and an opportunity to contest their determination that the building was a nuisance or a threat to public safety or health. According to Harris, the affidavit of his expert raised a genuine issue of material fact as to whether the condition of the building on July 17 was such that the defendants properly proceeded under the emergency provisions of code §190.705. He contends that the defendants should have proceeded under code §190.701, which requires that unsafe buildings be removed or repaired and code §190.702, which provides:

> *§ 190.702 INSPECTION; NOTICE OF UNSAFE BUILDING; SERVICE, SECURING VACANT STRUCTURE.*
>
> (A) The Superintendent of Building Inspection shall examine every building or structure reported as dangerous, unsafe structurally, or constituting a fire hazard; and he shall cause the report to be filed in a docket of unsafe structure, the nature and estimated amount of damages, if any, caused by collapse or failure.
>
> (B) If the person to whom such notice and order is addressed cannot be found within the city after diligent

> search, then such notice and order shall be sent by certified mail to the last known address of such person. A copy of the notice shall be posted in a conspicuous place on the premises and posting shall be deemed adequate service.

Harris argues that the depositions of Burgoon and other city officials clearly contradict each other on the critical issue of whether an emergency existed. Only a fact-finder, after considering all the evidence, could conclude that Hymes and Burgoon reasonably treated the condition of the building as an emergency requiring demolition without prior notice. And if the demolition were found to have been properly carried out as an emergency under code §190.705 the plaintiff would be required to seek damages in a postdeprivation state court action. According to Harris, the district court erroneously analyzed the case and granted summary judgment on the procedural due process claim when there was an unresolved issue of material fact. He argues that the district court assumed that an emergency existed, but the essence of the plaintiff's procedural due process argument is that there was no emergency. The plaintiff asserts that the Bergson affidavit put this question squarely in issue.

With respect to his substantive due process claim, Harris argues that the defendants acted arbitrarily and capriciously in destroying his building even though they proceeded under code provisions that are facially fair. He contends that there was no rational basis for the defendants' actions under the circumstances. He also asserts that the Fourteenth Amendment prohibition against deprivation of property by a governmental entity "implicitly contains the same basis on taking [private] property without just compensation as does the more explicit 5th Amendment."

B.

The defendants maintain that the district court properly granted their motion for summary judgment because the plaintiff failed to produce "specific facts" showing the existence of a genuine issue of material fact; evidence

"suggesting the possibility" of such an issue is not sufficient to avoid summary judgment. Without discussing the Bergson affidavit, the defendants argue that because they followed the emergency procedure of code §190.705, in the absence of a constitutional challenge to that procedure, the plaintiff has not stated a procedural due process cause of action, but merely a non-federal claim for tort damages based on negligence.

Departing from the reasoning of the district court, the defendants do not argue that their actions were random and unauthorized. Rather, they contend that the emergency created a situation in which it was impossible to provide prior notice and a hearing before demolishing the building. Under such circumstances, due process does not require a predeprivation hearing if state law provides an adequate postdeprivation remedy. Ohio does provide such a remedy, they assert, by permitting an inverse condemnation action. According to the defendants, the plaintiff's conclusory allegations are not sufficient to create an issue of fact.

As an alternative procedural due process argument, the defendants also assert that the plaintiff's claim is not ripe for review. Because the due process claim grows out of a "taking," they argue that any deprivation is not complete until the plaintiff has sought compensation from the city and failed to obtain it. This is so, they say, because a taking by the governmental unit is not by itself a constitutional violation; it is only when the governmental body takes property and fails to compensate the owner that the taking infringes a constitutional right.

Answering the plaintiff's substantive due process arguments, the defendants state that their actions were not arbitrary or capricious. Indeed, they argue, they carefully followed the procedures prescribed by the city code. The defendants contend that a city may invade individual rights in the interest of public safety,health, morals, or the general welfare so long as its agents do not act arbitrarily or capriciously. Further, the defendants maintain that nothing they did in demolishing the plaintiff's building

could reasonably be found to shock the conscience of a reasonable person.

III.

The Due Process Clause of the Fourteenth Amendment does not prohibit every deprivation by the state of an individual's life, liberty or property. Only those deprivations carried out without due process are actionable under 42 U.S.C. §1983. Generally, the process that is due before the state may deprive an owner of property includes notice to the owner prior to the deprivation and an opportunity for a predeprivation hearing.

A.

We now examine the exception to these general due process requirements that was the basis of the district court's decision to grant summary judgment for the defendants in the present case. In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court explicitly held that in some situations a state may satisfy procedural due process by providing "some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." *Id.* at 539. When the situation necessitates "quick action" by the state or makes efforts to provide a meaningful predeprivation process impracticable, the persons acting under state authority may proceed without violating the property owner's rights so long as the state provides an adequate postdeprivation procedure. *Id.* Such a procedure satisfies the "fundamental requirement of due process" - an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 540 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Parratt involved a tortious destruction of a state prisoner's personal property by the random and unauthorized act of a prison guard, but the rule announced by the Court was not limited to such acts. The touchstone of the *Parratt* rule is the impossibility or impracticability of providing predeprivation process combined with provisions for adequate postdeprivation process.

The Supreme Court made it clear in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), that where state actors are following established state procedures that result in the deprivation of an individual's property, ordinarily the existence of postdeprivation remedies is irrelevant. In such cases the general due process requirements of prior notice and opportunity to be heard apply. Nevertheless, even when the defendants are acting pursuant to established procedures, if a predeprivation due process hearing is impossible or impracticable, or the necessity for quick action exists, a postdeprivation remedy may be adequate. *Id.* at 436.

In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court narrowed its *Parratt* holding. The plaintiff in *Zinermon* was admitted to a state mental hospital and confined for a period of time pursuant to Florida's voluntary admission procedures. In his §1983 action he alleged that hospital doctors and administrators knew or should have known that he was incompetent to give informed consent to his "voluntary" admission. Thus, he contended, it was a denial of his procedural due process rights for the state not to use the Florida procedure for involuntary placement, which required notice and a hearing before he could be hospitalized for more than the brief time required for an evaluation.

The Court acknowledged that *Parratt* applies when postdeprivation remedies are the only ones that a state could be expected to provide because of the impossibility or impracticability of providing remedies prior to the deprivation. *Zinermon*, 493 U.S. at 128. *Parratt* does not control, however, when the state provides a procedure under which it is predictable that its officials may deprive a person of a protected right. A predeprivation process for Burch, the hospitalized plaintiff, would not have been impossible or impracticable, the Court held, because the state agents could have proceeded under the involuntary commitment provisions of Florida law. The action of the state employees was not "unauthorized" in the *Parratt* sense because the state "delegated to them the power and

authority to effect the very deprivation complained of here. . . ." *Id.* at 138. The deprivation complained of was unauthorized "only in the sense that that it was not an act sanctioned by state law, but, instead was a 'depriv[ation] of constitutional rights . . . by an official's abuse of his position.'" *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)).

B.

This court has examined and applied *Parratt*, *Logan*, and *Hudson v. Palmer*, 468 U.S. 517 (1984), (holding that the *Parratt* rule applies to intentional as well as negligent[1] acts) in numerous cases, but we need consider only a few of those decisions here.

In *Watts v. Burkhart*, 854 F.2d 839 (6th Cir. 1988), we held that generally where a deprivation is caused by application of established state procedures, the existence of adequate postdeprivation procedures is irrelevant. *Id.* at 843. In *Watts* a doctor argued that procedures initiated by a state agency to suspend his license to practice medicine were inadequate and therefore violated due process. The district court dismissed the procedural due process claim under the *Parratt* rule. We reversed, finding that the district court erred in dismissing under *Parratt* when the official actions were taken pursuant to established procedures and there was no showing that quick action by the authorities was essential. *Id.* at 843-44.

In *Doe v. Sullivan County, Tenn.*, 956 F.2d 545 (6th Cir. 1992), a state inmate sought damages under §1983 for injuries received when a cellmate assaulted him. The plaintiff claimed that the jail superintendent and other county officials violated the Eighth Amendment by acting

---

[1]The Supreme Court overruled Parratt in *Daniels v. Williams*, 474 U.S. 327 (1986), to the extent *Parratt* held that negligent acts of state officials causing unintended deprivation of life, liberty or property constitute due process violations.

with reckless disregard for his safety, thus depriving him of a protected liberty interest. We found that the district court's jury instructions on procedural due process were deficient. Quoting *Zinermon*, we stated, "[w]hether the postdeprivation remedies provide constitutionally adequate recourse will turn on 'whether predeprivation procedural safeguards could address the risk of deprivations of the kind . . . allege[d],' . . . or 'whether predeprivation safeguards would have any value in guarding against the kind of deprivation . . . allegedly suffered.'" 956 F.2d at 558-59 (quoting 494 U.S. at 132 and 135).

Both sides cite *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154 (6th Cir. 1992), in support of their positions. We believe this reliance is misplaced. *Bigelow* was a "taking" case in which the procedural due process claim was "ancillary to [the] main issue." *Id.* at 160. That is not the present case. The magistrate judge recommended that Harris' Fifth Amendment taking claim be dismissed and Harris did not file an objection to that recommendation. Failure to file an objection to a magistrate judge's recommendation constitutes a waiver of the right to appeal on the basis of that recommendation. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). The matter comes to us as a "pure due process case," not as one in which the due process claims are ancillary to any other claim.

IV.

We review an order granting summary judgment de novo. *Patton v. Beardon*, 8 F.3d 343, 346 (6th Cir. 1993). Summary judgment may be granted only where there are no genuine issues of material fact and the moving parties are entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The court considering a motion for summary judgment must consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in the light most favorable to the party opposing the motion. *Id.*;

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). The non-moving party may not rely on his pleadings alone, but must demonstrate the existence of a genuine issue for trial by pointing to "specific facts" that create such an issue. *Id.* at 586-87; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The judge may not make credibility determinations or weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

V.

A.

The district court erred in treating the plaintiff's procedural due process claim as one for deprivation of property by reason of a random or unauthorized act of a government official. From the beginning Harris stressed that the defendants acted pursuant to established procedures but either with intent to injure his property or with reckless disregard of the requirements for determining whether an emergency actually existed before deciding to demolish his building. The district court relied upon dictum in *Macene v. M.J.W., Inc.*, 951 F.2d 700 (6th Cir. 1991), where we stated that a plaintiff can prevail in a §1983 procedural due process claim in one of two ways:

> (1) by demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of property rights pursuant to a "random and unauthorized act" *and* that available state remedies would not adequately compensate for the loss.

Id. at 706 (emphasis in original). The present case involves the situation referred to in *Parratt*, where "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the property of the State's action at some time after the initial taking, can

satisfy the requirements of procedural due process." 451 U.S. at 539 (footnote omitted).

Harris alleged that the defendants followed an established state procedure outlined in the city code, but in their haste to demolish his building, they found an emergency where none actually existed and, as a result, followed the wrong established procedure. In the absence of an emergency Harris claimed he was entitled to notice and an opportunity to be heard as provided in code §190.702. The defendants responded that they acted pursuant to a code provision applying to emergencies, and that their efforts to give Harris notice before the demolition were unavailing.

B.

As in *Zinermon*, the plaintiff here does not challenge the constitutionality of the emergency procedure in code §190.705. Rather, Harris charges that Hymes and Burgoon and other city officials acted improperly in deciding there was an emergency situation and then proceeding under code §190.705, which dispensed with the notice requirement applicable to non-emergency situations under code under code §190.702. This act was "authorized" because the code delegated to Hymes and Burgoon the authority under which they proceeded, and thus permitted the very act that the plaintiff complains of - demolition of his property without prior notice.

Despite the similarities described above, however, we believe *Zinermon* is distinguishable. To the extent there was an emergency requiring the *Zinermon* plaintiff Burch to be hospitalized immediately, this could have been accomplished under *either* the voluntary or the involuntary admission procedure. *Zinermon*, 494 U.S. at 136-37. If the state officials had followed the involuntary procedure, Burch would have been admitted for observation and evaluation over a limited time and would have had an opportunity to contest the findings prior to an indefinite commitment. He would not have been subjected to the seven months of confinement that resulted from his

allegedly wrongful admission under the voluntary procedure.

No such option was available to the Akron officials. If an emergency existed, the only available course of action for removing the threat to public health and safety was to carry out the demolition forthwith. Under these circumstances, there was no opportunity for notice and a predeprivation process. An erroneous determination that no emergency existed would have resulted in the very threat to the public that the code was intended to prevent. Thus, if there was an actual emergency, unlike in *Zinermon*, the authorities in this case could remove that emergency only by destroying the building. Following the non-emergency procedure of code §190.702 would have left the emergency untreated and the public exposed to the resulting danger.

In addition, *Zinermon* involved a liberty interest, not just property. In *Parratt* the Court quoted from two earlier opinions the rule that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." 451 U.S. at 540 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974), in turn quoting *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931) (interior quotation marks omitted)). The facts and holding of *Zinermon* simply do not fit this case.

C.

Code §190.705 leaves the determination of whether an emergency existed on July 17 completely within the judgment of the superintendent of building inspection. Harris has not attacked the constitutionality of code §190.705 for lack of standards or otherwise. Thus, he accepts the authority of this official to make the determination, but questions the correctness of his judgment. Regardless of whether the official's conclusion as to the existence of an emergency was correct or not, the unchallenged code section placed him in a position where

there was "necessity of quick action." *Parratt*, 451 U.S. at 539. Under these circumstances, it was impracticable to wait for a predeprivation process to run its course. The availability of a meaningful postdeprivation process "by which to assess the propriety of the [city's] action at some time after the initial taking" satisfied the requirements of procedural due process. *Id.* Our *Watts* decision is not to the contrary, as it recognizes the emergency exception, stating there was no showing that it was essential for the authorities to take quick action.

The Bergson affidavit demonstrated the existence of a genuine issue of fact, but we conclude that no genuine issue of *material* fact existed in this case. With the authority of the decision makers unchallenged, the question of whether an emergency actually existed constituted nothing more than a question of whether they made the right decision. By attempting to show only that the defendants made the wrong decision, Harris in no sense attacked the constitutionality of the process by which that decision was reached.

We conclude that the district court correctly granted summary judgment on the plaintiff's procedural due process claim. Although the court incorrectly analyzed the issue under the "random and unauthorized act" *Parratt* exception, we believe judgment for the defendants was proper under the other *Parratt* rationale. The defendants were faced with a situation that required quick action. The non-emergency procedure for notifying the owner of a building would not have removed the threat to public safety and health perceived by the responsible officials. The state provided a meaningful postdeprivation process to determine the propriety of the demolition decision. Under these circumstances the requirements of procedural due process were satisfied.

VI.

This court has recognized two types of substantive due process violations: (1) official acts that are unreasonable and arbitrary and "may not take place no matter what

procedural protections accompany them," and (2) official conduct that "shocks the conscience." *Wilson v. Beebe*, 770 F.2d 578, 586 (6th Cir. 1985) (en banc) (quoting *Hudson v. Palmer*, 468 U.S. at 541 n.4 (separate opinion of Stevens, J.)). Although Harris alleged in his complaint that the defendants acted arbitrarily and in bad faith, when faced with a motion for summary judgment he came forward with no proof of specific facts in support of that claim. Bergson's affidavit states that the defendants acted hastily and without resorting to available means of determining the true condition of the building. Harris offered no evidence in support of his claim that any of the officials acted arbitrarily and unreasonably, or in bad faith. At most the proffered evidence pointed to a faulty decision made in haste. The code gave these officials the authority to demolish a building found to be a threat to public safety or health and the plaintiff produced no proof that they abused that power.

So far as we know, or have been informed, no court has held that it shocks the conscience for municipal authorities, acting pursuant to an unchallenged ordinance, to order the destruction of a building found by responsible officers to be a nuisance or threat to public health or safety. Although perhaps the defendants could have made further inquiries concerning the condition of the building, their deposition testimony makes clear that they acted on the basis of their observations and training. The district court properly granted summary judgment on the substantive due process claim.

CONCLUSION

Parratt holds that government actors faced with the necessity to take quick action under circumstances where it is impracticable or impossible to provide predeprivation process do not violate an individual's due process rights by depriving him of property so long as there is in place a meaningful postdeprivation process. It is not necessary that the official conduct consist of random and unauthorized acts for *Parratt* to apply. The record in this case does not

support the plaintiff's claim of either a procedural or substantive due process violation.

The plaintiff is not without a remedy, however. The district court, accepting the magistrate judge's recommendation, dismissed Harris' "taking" claim as premature; it did not decide that claim on the merits. The plaintiff may pursue his claim for damages in an inverse condemnation proceeding as recognized by the Ohio Supreme Court in *Solly v. City of Toledo*, 7 Ohio St.2d 16, 19-20 (1966). Only if that action fails to produce a remedy will the plaintiff have fulfilled the prerequisites for a Fifth Amendment claim based on a taking of his property without just compensation. *Williamson County Reg. Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 185, 194-95 (1985); *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157-58 (6th Cir. 1992).

The judgment of the district court is affirmed.

Case No: 93-3056

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER
(Filed Apr. 29, 1994)

JOHN H. HARRIS

Plaintiff – Appellant

v.

CITY OF AKRON

Defendant – Appellee

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Harris, Plaintiff,	)	CASE NO. 5:90 CV 1494
vs.	)	MEMORANDUM OPINION
Kevin Ragle, et al., Defendants.	)	

I. INTRODUCTION

By this lawsuit, plaintiff John Harris (hereafter "plaintiff") raises several constitutional challenges arising out of the demolition of his property by Akron municipal authorities. Plaintiff's property was located at 488 Wooster Avenue and was completely destroyed pursuant to Akron Building Code §190.705.

Defendants, the City of Akron and several city employees, have moved for summary judgment. Before this Court is the April 20, 1992 Report and Recommendation of Magistrate Judge James S. Gallas, (docket No. 69). Defendants have filed timely objections to the Report, (docket Nos. 70 and 78), and plaintiff has filed responses to the defendants' objections, (docket Nos. 75 and 76).[1] The Magistrate Judge recommended that plaintiff's conspiracy claim and Fifth Amendment taking claim be dismissed, but that plaintiff should be permitted to litigate

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[1] Plaintiff did not file any objections to the Magistrate Judge's Report.

his §1983 action based on due process and equal protection grounds.

For the reasons that follow, the Magistrate Judge's Report and Recommendation is adopted in part, and rejected in part. The defendants are granted summary judgment on all claims.

II. FACTUAL BACKGROUND

At 11:45 a.m. on July 17, 1990, the Akron Building Department was informed that a wall of plaintiff's building had collapsed. The structure was used as a warehouse for building materials. After inspecting the building, Chief Building Inspector for the City of Akron, defendant John Hymes (hereafter "defendant Hymes") determined that emergency demolition procedures were warranted pursuant to Akron City Code §190.705(A), which states in pertinent part:

> Emergency Work
>
> In case there shall be, in the opinion of the Superintendent of Building Inspection, actual and immediate danger of failure or collapse of a building or structure or any part thereof so as to endanger life or property, he shall cause the necessary work to be done to render the building or structure or party thereof temporarily safe. If the building or structure is in such a state of decay that it is impracticable to be repaired, he may order the building or structure razed or demolished.

Defendant Greg Burgoon (hereafter "defendant Burgoon"), Building Inspector Superintendent, ordered the demolition to begin at approximately 4:10 p.m.

Defendant Hymes attempted to notify plaintiff of the impending demolition by placing a telephone call to the plaintiff's home. Since plaintiff did not answer the phone, defendant Hymes contends that he left a message for plaintiff on his answering machine. Neither defendant Hymes, nor any other Akron employee, spoke to plaintiff prior to the demolition of his warehouse.

Defendant Hymes' original plan was to partly demolish the structure to render it stable. Defendants assert that upon beginning the partial demolition, it was discovered that the entire structure needed to be razed to abate an emergency.

Plaintiff claims that the emergency situation necessitating partial demolition did not exist. Plaintiff further claims that the necessity to raze the entire structure resulted from the defendants' lack of care.

III. LAW AND DISCUSSION

The Magistrate Judge has entered his Report and Recommendation pursuant to 28 U.S.C. §636(c)(1) and Chapter 19, Rule 19.06, of the Local Civil Rules. Upon review, this Court must make a *de novo* determination of the portions of the Report in which the parties have filed timely objections. 28 U.S.C. §636(b)(1)(c); and *Thomas v. Arn*, 474 U.S. 140 (1985). This Court may adopt or reject all or portions of the Magistrate's Report. *Thomas, supra.*

Defendants challenge the Magistrate Judge's conclusion that plaintiff's due process claim under the Fourteenth Amendment cannot be dismissed. Defendants further contend that plaintiff has failed to state a claim

for violations of substantive due process, and equal protection.

A. Substantive due process.

Substantive due process bars "certain arbitrary, wrongful government actions regardless of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1989). A violation of an individual's substantive due process rights will lie only where a right "so rooted in the traditions and conscience of our people as to rank as fundamental" has been denied. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) *quoting Sunder v. Massachusetts*, 291 U.S. 97 (1934), *overruled on other grounds, Duncan v. Louisiana*, 391 U.S. 145 (1968). A plaintiff may invoke §1983 for a substantive due process claim regardless of the availability of state remedies. *Zinermon, supra.*

Read broadly, plaintiff's Complaint fails to challenge the constitutional adequacy of Akron Building Code § 190.705. Plaintiff's argument is that the facts of this case do not fall within the scope of an "emergency situation" and that §190.705 should not apply. Therefore, the procedure and not the substance of this action is at issue and plaintiff has alleged a procedural due process claim.

B. Procedural due process.

Unlike substantive due process, in a procedural due process claim the "deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not itself unconstitutional; what is unconstitutional is

the deprivation of such an interest *without due process of law.*" (emphasis in original) *Zinermon, supra* at 125, *quoting Paratt v. Taylor,* 451 U.S. 517, 537 (1981).

The Sixth Circuit has determined that a plaintiff may prevail on a §1983 procedural due process claim by either "(1) demonstrating that he is deprived of property as a result of an established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of property pursuant to a 'random and unauthorized act' *and* that available state remedies would not adequately compensate for the loss." *Macene v. MJW, Inc.,* 951 F.2d 700, 706 (6th Cir. 1991) (emphasis in original) *citing Collins v. Nagle,* 892 F.2d 489 (6th Cir. 1989). *See also Davis v. Robbs,* 794 F.2d 1129 (6th Cir. 1986). Plaintiff does not allege that the procedure itself violates due process. Rather, plaintiff claims that he was deprived of his property, namely his warehouse, due to improper conduct by defendant Hymes in ordering the demolition. Further, plaintiff claims that he was provided with neither notice, nor an opportunity to be heard before the house was razed.

The present case falls within the reasoning of *Parratt v. Taylor, supra.* Generally, due process, entailing notice and an opportunity to be heard, must be provided *before* the State deprives a person of either liberty or property. *Roadway Express v. Piper,* 447 U.S. 752 (1980); and *Long v. Norris,* 922 F.2d 1111 (6th Cir. 1991). In *Parratt,* however, the Court recognized that in certain situations, such as those involving random and unauthorized conduct of an employee, or where it is essential that the State take immediate action, the governmental employer cannot anticipate a potential due process violation, and cannot,

therefore, provide for a pre-deprivation remedy. In these cases, the *Parratt* Court held, the municipality may provide a post-deprivation remedy, so long as it adequately remedies the loss. Further, the Court held that in such situations where post-deprivations are sufficient to guarantee procedural due process, due process has not been denied unless and until the State fails to provide that post-deprivation remedy. *See also Hudson v. Palmer,* 468 U.S. 517 (1984).

Inherent in Akron Building Code §190.705 is the expectation that certain, unpredictable circumstances will arise which require immediate action by a designated City official. Predeprivation proceedings are not practicable because quick action is essential. As a result, in the situation where an individual's building has been razed, the individual's procedural due process rights have not been violated until he has been denied adequate post-deprivation remedies. *See Parratt, supra* at 539; and *Watts v. Burkhart,* 854 F.2d 839, 844 (6th Cir. 1988) ("[A] state may deprive a protected property or liberty interest without providing predeprivation process when it is essential for the state to take quick action.")

The plaintiff bringing the §1983 suit carries the burden of proving the inadequacy of state remedies in *Parratt* type cases. *Watts, supra* at 843. The plaintiff has failed to prove the lack of adequate post-deprivation remedies; nor has he proven that, despite the existence of adequate post-deprivation remedies, he was denied relief. In fact, plaintiff did not even plead that state remedies were unavailable or inadequate. *See Watts, supra* at 843 (failure to plead inadequacy of state remedies in *Parratt* type §1983 claims renders such claims subject to dismissal). As

a result, plaintiff has not made out a claim for procedural due process.

C. Equal protection.

Defendants next challenge the Magistrate Judge's recommendation that plaintiff may go forward on his equal protection claim because the defendants failed to challenge such a claim. Plaintiff's second amended complaint, however, not only fails to allege that plaintiff is a member of a cognizable racial group, but also fails to allege how defendants' conduct was discriminatory based on plaintiffs' affiliation with such group. *See Massachusetts v. Fenney,* 442 U.S. 256 (1979; and *Conklin v. Lovely,* 834 F.2d 543 (6th Cir. 1987).

The Court finds that as a matter of law, plaintiff has failed to make out a claim for denial of equal protection. Therefore, plaintiff's equal protection claim is dismissed.

IV. CONCLUSION

For the foregoing reasons, the Magistrate Judge's Report and Recommendation is adopted in part, and rejected in part. Defendants are granted summary judgment on all of plaintiff's claims.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN HARRIS, Plaintiff, -vs- KEVIN RAGLE, et al., Defendants.	Case No. 5:90 CV 1494 Judge David D. Dowd, Jr. REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (Filed Apr. 20, 1992) Magistrate Judge James S. Gallas

Defendants have filed a motion to dismiss or in the alternative motion for summary judgment accompanied by supporting affidavits. Plaintiff has opposed dismissal and entry of summary judgment with the affidavit of an expert witness and deposition transcripts.[1]

This case arose from the demolition of plaintiff's structure at 488 Wooster Avenue in Akron by municipal authorities. Plaintiff claims that this structure was a warehouse for building materials. Defendants maintain that plaintiff's structure was an actual and immediate threat to life or property and was in such a state of disrepair that it was impracticable to repair it. Defendants state that the upper east wall had moved inward four to five feet, and the roof had collapsed, pulling the walls inward, so that emergency demolition was required. The incident

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[1] This court is aware, as defendants have pointed out, that several of plaintiff's exhibits are not cognizable under Rule 56 governing summary judgment.

began 11:45 a.m. on July 17, 1990 when the Akron Building Department was informed that the east wall of the structure had collapsed (Hymes Affidavit ¶ 3; Burgoon Affidavit ¶ 3). Defendants claim that notice of impending demolition was given when John Hymes, the Chief Building Inspector, placed a telephone call to a phone number for plaintiff's address, as listed in a Burch Directory. Mr. Hymes further states that he was informed during this telephone call that plaintiff was not there, that he explained to the person answering the call that there was an emergency situation at 488 Wooster Avenue and that he left a message for plaintiff to contact him immediately. Greg Burgoon, the Superintendent of Building Inspection, stated that initially the plan was to partially demolish the structure to remedy the inward collapse of the structure's second floor walls. However, he states the demolition proceeded as follows:

> Emergency demolition, pursuant to my order, began at 4:10 p.m. I observed that the mortar in the building began to crumble into powder. After knocking the front and east sidewall, the second level, into the lower floor the entire building shook and swayed. Based on my experience and knowledge of construction, my authority as Superintendent of Building Inspection, and with the concurrence of my Chief Building Inspector, it was then my opinion that the emergency would not be abated by collapsing the upper floor into the lower floor and that the building was in such a state of decay as to make it necessary to raze the entire structure. I ordered the contractor [Lockhart] to raze the entire structure pursuant to Akron City Code

> 190.705 because I believed that there was imminent danger of collapse and an immediate threat to the health, safety and welfare of the public and that the nuisance could not be abated and the threat of collapse removed if the structure was not razed.

(Burgoon Affidavit ¶10).

The affidavit from plaintiff's expert, Jack J. Bergson, states that there are inconsistencies between Mr. Burgoon's statements and the photographs taken of the structure. Mr. Bergson claims:

> An error in facts that was repeated several times in the documents pertained to the extent of visible damage on the exterior. Quoting from the request for dismissal or summary judgment, page 11: ' . . . In the instant case, an emergency situation existed. The east wall of the building had caved in and the wall facing the street was bowing out over the sidewalk . . . ' Regarding the two observations in the preceding sentence: a) the first was very misleading and b) the second was incorrect. Examination of the photos taken by the Akron officials and corroborated in photos taken by others, it was clear and noncontroversial that: a) the east wall had not caved in, only a portion of the upper part of the east wall had sustained damage and b) the front wall was not bowing out over the sidewalk, in fact was not bowed at all.

(Bergson Affidavit pg. 8)

Plaintiff's expert further states that the inspection was conducted from ground level where the condition of the flat roof could not be seen, that no interior inspection was made, and that enforcement officials lacked positive

information concerning interior construction and condition. Mr. Bergson contends that the total demolition was due to a failure to exercise care:

> Based on the photos there was a preponderance of evidence that no care was taken to limit demolition and that the decision to raze was due to the fact that Lockhart had gone to far, i.e., did not take care to avoid damaging the first story so badly while tearing out the second story that, as a result, the Akron officials no longer had a choice and had to order total demolition.

(Bergson Affidavit pg. 6). Obviously there is disagreement whether summary demolition was warranted.

LAW AND ARGUMENT

In the second amended complaint, plaintiff alleges in his first count that defendants in their individual and official capacities acted under color of state law violating his constitutional rights of due process, equal protection, and taking of property without just compensation, as protected under 42 U.S.C. §1983. Plaintiff's second count alleges that the individual defendants conspired to deprive plaintiff of property in violation of his constitutional rights protected under 42 U.S.C. §1985(3). In short, plaintiff alleges violations of his Fifth Amendment right to just compensation, substantive and procedural due process, equal protection and §1985 conspiracy.

Defendants first argue that plaintiff has failed to plead allegations that would entitle him to relief. Rule 12(b)(6) permits the district court to dismiss a complaint on motion when the plaintiff fails to state a claim upon

which relief can be granted. "A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). A motion to dismiss a complaint under Rule 12(b) does not test the facts supporting the claim. *Niece v. Sears Roebuck & Co.*, 293 F.Sup. 792, 794 (N.D. Okla. 1968). The court must accept all factual allegations in the complaint, and take them as true. *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100, 109 (1990); *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). A Rule 12(b)(6) motion tests the *legal* sufficiency of the complaint. *Bing v. General Motors Acceptance Corp.*, 237 F.Supp. 911 (E.D. S.C. 1965). Thus, defendants are not challenging the veracity of plaintiff's allegations for the purpose of 12(b)(6) review.

Alternatively, defendants seek summary judgment. Under Rule 56 of the Federal Rules of Civil Procedure granting a motion for summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether there is a genuine issue of material fact all inferences drawn from the underlying facts contained in affidavits, pleadings, responses to discovery requests, and depositions must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). A court must inquire "whether the evidence presents a sufficient disagreement to require submission to a

jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The court may not make credibility determinations or weigh the evidence when ruling on a motion for summary judgment. *Anderson*, 477 U.S. at 255. The burden is upon the movant to demonstrate the absence of a genuine issue of material fact. *Andickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir. 1979). However, the nonmoving party is obliged to produce some evidence other than mere pleadings themselves to demonstrate that there is a genuine issue for trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 324 (1986).

This court has permitted plaintiff to amend his complaint, and will accordingly discuss the points raised by the defendants as they relate to the allegations in the second amended complaint. Although plaintiff has substituted new individuals in his amended version, the second amended complaint carries with it the same primary sufficiencies and deficiencies as its first amended version. Accordingly, this court will not hesitate to examine defendants' contentions.

Liability under §1983:

In order to state a cause of action under §1983, plaintiff must allege that some person acted under color of state or territorial law, that deprived plaintiff of a federal constitutional or statutory right. *Gomez v. Toledo*, 446 U.S. 635 (1980); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). In his first count, plaintiff alleges that defendants

violated Fifth and Fourteenth Amendment rights in violation of §1983. Defendants contend that plaintiff's §1983 claims should be dismissed as premature because plaintiff has not yet utilized state procedures for compensation.

5th Amendment:

Plaintiff's Fifth Amendment claim is premature and should be dismissed. As explained in *Williamson Planning Commission v. Hamilton Bank*:

> . . . however, because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a §1983 action.

473 U.S. 172, 193 n. 13, 87 L.Ed.2d 126, 143 n. 13 (1985). *And see, Four Seasons Apartment v. City of Mayfield Heights,* 775 F.2d 150, 151 (6th Cir. 1985). Neither in the amended complaint nor in his brief in opposition does plaintiff state that he has utilized state procedures.

Plaintiff does, however, question whether state procedures exist. Defendants argue that plaintiff possesses an adequate state remedy in the form of an inverse condemnation proceeding. Defendants rely on *Yates v. Jamison,* 782 F.2d 1182 (4th Cir. 1986), a federal case construing North Carolina law for this proposition. Defendants also cite *Wilson v. Cincinnati,* 172 Ohio St. 303, 16 Ohio Op.2d 71 (1961) for this proposition. *Wilson* does not refer to the term inverse condemnation, but it does

state that there is a right to bring an action in mandamus to compel appropriation of property previously taken for public highway use. *Wilson* is, however, factually distinguishable.

Nevertheless, there is an adequate state remedy for governmental action in razing structures, although that remedy may not necessarily be an inverse condemnation proceeding. The Ohio Supreme Court explained in *Solly v. City of Toledo*:

> Thus, a charter city may enact legislation authorizing summary abatement of public nuisances and the destruction of property used in maintaining such nuisances when reasonably necessary to effectuate their abatement.
>
> However, no legislation can authorize the destruction of private property as a public nuisance unless such property comes within a valid legislative definition (by statute or ordinance) of a public nuisance or is expressly proscribed by valid legislation (i.e., by statute or ordinance)
>
> . . .
>
> Hence, even an officer, who destroys or injures private property in abating what legislative or administrative officials have determined to be a public nuisance, does so at his peril, where there has been neither a previous judicial determination that such supposed nuisance is a public nuisance nor even an opportunity provided to the owner for an administrative hearing (with a judicial review thereof) on the question as to whether there is a public nuisance.
>
> In such an instance, when sued by the owner, the officer must allege and prove that what he

> destroyed was a public nuisance and that its destruction was reasonably necessary for abatement of that nuisance. If the trier of the facts finds otherwise, the officer may be held liable for damages caused by such destruction.
>
> In such an instance, if such officer was acting within the scope of his employment for a city in destroying the supposed nuisance, the city would be liable under the doctrine of *respondeat superior* unless protected by governmental immunity. (citations omitted).

7 Ohio St.2d 16, 19-20, 36 Ohio Op.2d 9, 11 (1966). *And see Shimola v. City of Cleveland*, 65 Ohio App.3d 457, 584 N.E.2d 774 (1989). Clearly in view of *Solly* and *Shimola*, there are adequate state procedures to address the issue of just compensation under the Fifth Amendment. Accordingly, plaintiff's Fifth Amendment claim contained in his § 1983 action must be dismissed as premature.

Due Process:

The other basis of plaintiff's § 1983 action against defendants, concerns denial of due process in both its substantive and procedural aspects. Defendants contend that the denial of due process claims must be dismissed in accordance with *Parratt v. Taylor*, 451 U.S. 527 (1981), because plaintiff has an adequate state remedy. *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986), does support defendants' contention. In *Yates*, the owners were not notified that their unoccupied house was to be razed by municipal authorities. Following demolition, the owners alleged deprivation of property without due process in their § 1983 action against the city and its employees. The

Fourth Circuit held, relying on *Parratt*, that dismissal was required because the owners possessed an adequate and meaningful postdeprivation remedy. *Yates*, at 1185. There was, however, a vigorous dissent to the majority's position.

Yates now appears to be incorrect and contrary to the Supreme Court's decision in *Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100 (1990). The general rule is that the existence of overlapping state remedies *is irrelevant* to the existence of a cause of action for a § 1983 due process claim. *Zinermon* reemphasizes that *Parratt* involves a limited exception which applies to "random and unauthorized conduct" of a type which the governing body could not anticipate, making it impossible for the governing body to provide some form of predeprivation process. *Zinermon*, 108 L.Ed.2d at 116-17.

Thus, there is a critical distinction between a Fifth Amendment just compensation claim and a Fourteenth Amendment denial of due process claim. The just compensation claim requires the exercise of state postdeprivation remedies, because no predeprivation process or compensation is required. *Williamson Planning Commission*, 473 U.S. at 195, 87 L.Ed.2d at 144; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 81 L.Ed.2d 815 (1984). However, the availability of a postdeprivation remedy is of no consequence in plaintiff's due process claim, because *Paratt* does not extend to deprivation of property pursuant to an established policy and procedure where predeprivation process could be provided. *Williamson Planning Commission*, 473 U.S. at 195, 87 L.Ed.2d at 144 n. 14; *Jones v. Metropolitan Government of Nashville*, Case No.

3:87-0708, unreported LEXIS 6797 (M.D. Tenn. June 12, 1989).

Both the facts alleged in the complaint, and defendants' affidavits demonstrate that the municipal employees were not engaged in a random and unauthorized frolic when they razed plaintiff's structure. Instead defendants followed a procedure set forth by local ordinance with top-level administrative involvement. Therefore, plaintiff is not required to exercise post-deprivation remedies prior to commencing this § 1983 action nor alleged denial of due process. Plaintiff's claim that there was an illegal exercise of municipal police power thus survives defendants' challenge that this claim was premature.

This leads to the next issue concerning the defendant's failure to provide a *pre*deprivation hearing. There are instances where " 'the necessity of quick action by the State or the impracticability of providing any predeprivation process,' may mean that a postdeprivation remedy is constitutionally adequate." *Zinermon*, 108 L.Ed.2d at 115; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 71 L.Ed.2d 265, 278 (1982). However, this begs the question whether it was necessary to demolish plaintiff's structure within a few hours from the time the Akron Building Department received notice that the structure was in disrepair. Precedent in the Northern District of Ohio states:

> It has been held that when emergency conditions exist, a state may take action which deprives a person of a property interest without hearing or notice provided there is a special need for very prompt action. *Fuentes v. Shevin*,

> 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). It has also been held that when faced with conditions extremely dangerous to health and safety, a municipality may, pursuant to its police power, demolish a building summarily and without notice. *Miles v. District of Columbia*, 510 F.2d 188, 192 (C.A.D.C., 1975).

Superior Savings Association v. City of Cleveland, 501 F.Supp. 1244, 1249 (N.D. Ohio 1980). The answer to the question whether immediate action was required, is disputed, and this matter is certainly a material issue, having a direct bearing on whether predeprivation notice and hearing should have occurred. Accordingly, plaintiff's procedural due process claim must not be dismissed, because a hearing will be required to determine whether the condition of the structure justified demolition as an exercise of police power without notice or opportunity for a hearing.[2]

Qualified Immunity:

Defendants contend that Mssrs. Ragle, Nome, and Remmel should be dismissed on the basis of qualified immunity, and more importantly on their lack of direct involvement in razing plaintiff's structure. Plaintiff agrees, because the second amended complaint substitutes new defendants in their place. Since this court has

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[2] Defendants claim that notice was provided by the attempt to contact plaintiff by telephone and leaving a message with whomever answered the call. Plaintiff disputes that this notice was *bona fide*, because his whereabouts were known to city officials. The Akron Code, however, does not require notice. See Akron City Code §190.705.

granted leave to amend, this issue is moot regarding Mssrs. Ragle, Nome and Remmel.

However, regarding the new defendants, there are material questions of fact, hinging on the condition of plaintiff's structure.

Municipal officials performing administrative discretionary functions are entitled to qualified immunity if they can establish: first, that their actions were within the scope of their duties; and second, that the actions were taken with a reasonable belief that they were lawful. *Haskell v. Washington Township*, 864 F.2d 1266, 1277 (6th Cir. 1988). The Supreme Court has clearly stated in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982), that these actions are judged objectively and that if the right was not clearly established, the official is entitled to immunity so that the court should dismiss the case. *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988). The maxim is that the qualified immunity defense, "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 89 L.Ed.2d 271, 278 (1986). Certainly, the municipal ordinance permitted summary demolition *without notice* to the property owner. The ordinance also permitted summary demolition based upon "the opinion of the Superintendent of Building Inspection." (*Akron City Code* § 190.705). Under the municipal requirements, there is very little process due to the property owner. Nevertheless, plaintiff may yet be able to challenge this process by establishing that the superintendent's opinion was clearly erroneous in view of the physical condition of the structure. Since the physical condition of the structure is a matter in dispute, summary judgment cannot be entered

nor plaintiff's claims, relating to alleged denial of due process by municipal code enforcement officers, be dismissed.

Municipal Liability under §1983:

Defendants claim that the §1983 claims against the City of Akron must be dismissed because plaintiff failed to identify a particular policy, custom or usage which deprived him of his constitutional rights. The second amended complaint rectifies this problem by including municipal building department officials. Municipal liability may be incurred due to a single decision by municipal policymakers. *Pembaur v. Cincinnati*, 475 U.S. 469, 480, 89 L.Ed.2d 452, 463 (1986). Municipal liability attaches where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered. *Pembaur*, 475 U.S. at 481, 89 L.Ed.2d at 464. Since the municipal decision to raze plaintiff's structure required at most the superintendent's decision, and there is no dispute the Superintendent did in fact assent to the demolition. There is a direct link between the municipality and municipal policy. Accordingly, the City of Akron must not be dismissed.

Conspiracy under §1985:

Plaintiff alleges that defendants have violated his constitutional rights by conspiring and formulating a plan prior to July 17, 1990 to demolish plaintiff's property, in violation of 42 U.S.C. §1985(3). Plaintiff's allegations, however, fail to raise a claim of racial or other class-based discrimination, as required to prove a

§1985(3) claim. *See Griffen v. Breckenridge*, 403 U.S. 88 (1971); *Conklin v. Lovely*, 834 F.2d 543, 548 (6th Cir. 1987); *Rice v. Ohio Department of Transportation*, 887 F.2d 716, 722 (6th Cir. 1989). Accordingly, the plaintiff's second count which raises the §1985(3) claims must be dismissed.

Punitive Damages against City:

Defendants contend that punitive damages cannot be assessed against the City of Akron. Plaintiff's second amended complaint does not contain such a demand, and this issue therefore is now moot.

State Tort Claims:

Defendants contend that they are shielded pursuant to Ohio Revised Code Chapter 2744 from state tort liability. Plaintiff's second amended complaint does not contain a derivative state tort claim, and this issue is also now moot.

CONCLUSION

For the foregoing reasons it is recommended: *first* that defendants' motion for summary judgment be denied; *second* that defendants' Rule 12(b)(6) motion to dismiss be granted in part to dismiss the plaintiff's second count (which raises 42 U.S.C. §1985(3) conspiracy claims); and granted to dismiss the Fifth Amendment claim contained in plaintiff's first count. Plaintiff should,

however, be permitted to litigate his Fourteenth Amendment denial of due process claims under §1983 as contained in the first count and his denial of equal protection claim (which defendants have not challenged).

/s/ James S. Gallas
JAMES S. GALLAS
UNITED STATES
MAGISTRATE JUDGE

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See, United States v. Walters,* 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn,* 474 U.S. 140 (1985).

(2)

Supreme Court, U.S.
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No. 94-551

In The

Supreme Court of the United States

October Term, 1994

JOHN HARRIS,

Petitioner,

vs.

CITY OF AKRON, GREG BURGOON, JOHN HYMES AND JOHN DOE(S),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties before the Court of Appeals and this Court are Petitioner, John Harris and Respondents City of Akron, Building Inspection Superintendent Greg Burgoon and Chief Building Inspector John Hymes.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 20 F.3d 1396 (6th Cir. 1994). The opinion of the district court is unreported.

STATUTORY PROVISIONS INVOLVED

Ohio Constitution

Article I §19 [Inviolability of private property.]

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const. 1802, Art VIII, §4.)

Ohio Revised Code §2744.09 Actions and claims exempted from provisions.

> This chapter does not apply to, and shall not be construed to apply to, the following:
>
> (A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;
>
> (B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

SUMMARY OF ARGUMENT

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit affirming the decision of the district court for the Northern District of Ohio granting summary judgment in favor of Respondents. Petitioner asserts three reasons for review: whether the purported deference of the Sixth Circuit to the conclusion of City building department officials that an emergency existed is inconsistent with this Court's decision in *Waters v. Churchill*, 114 S. Ct. 1878 (1994); whether the decision of the Sixth Circuit raised an important issue of federal law as to the necessity of a reasonable basis for a decision to dispense with procedural safeguards; and whether the state inverse condemnation remedy is an adequate post-deprivation remedy despite the existence of the state political subdivision tort liability statute in Ohio. None of the grounds asserted by Petitioner present any substantial issue for review by this Court.

Petitioner's claim that the decision of the Sixth Circuit below is inconsistent with the Court's decision in *Waters v. Churchill* is misplaced. The principle articulated in *Waters*, a case involving the discharge of a government employee, sets forth procedural safeguards mandated by the First Amendment to the Constitution. The *Waters* case has no application to the facts or law at issue in this case. *Waters* did not purport to apply in the Fourteenth Amendment due process context nor does it change the substantial body of law on procedural due process upon which the Court of Appeals for the Sixth Circuit relied.

Petitioner contends that the decision of the Court of Appeals for the Sixth Circuit raises an issue of the need for government officials to have a reasonable basis for a decision to dispense with procedural safeguards before depriving a person of property. However, Petitioner maintains that postdeprivation remedies, even if adequate, are insufficient. This issue has long been decided. This Court has consistently held that, in certain circumstances, the existence of adequate postdeprivation remedies is all the procedure which is due. *Parratt v. Taylor*, 451 U.S. 527 (1981). No procedural safeguards are dispensed with. Respondents could not dispute that judicial review must be available to safeguard against abuse; however the postdeprivation remedy available and recognized by the courts below provides the necessary judicial review. Petitioner simply has voiced a preference for federal court.

Petitioner maintains that Ohio's Political Subdivision Tort Liability Act, Ohio Revised Code Chapter 2744, vitiates the adequacy of the state inverse condemnation remedy. Not only did Petitioner fail to preserve this issue in

this form in the court below, but Petitioner's argument misapprehends the nature of an action for inverse condemnation. Although Ohio Revised Code Chapter 2744 does not confer absolute immunity on Respondents from an action for inverse condemnation, the applicability of statutory immunity to inverse condemnation claims has not been decided by the state courts of Ohio and therefore should not be addressed by this Court.

REASONS FOR DENYING THE PETITION

I. THE "REASONABLENESS" STANDARD FOR GOVERNMENTAL DECISIONS IN FIRST AMENDMENT CLAIMS ESTABLISHED IN *WATERS V. CHURCHILL*, 114 S. CT. 1878 (1994) IS NOT AN APPLICABLE STANDARD BY WHICH TO EVALUATE THE RESPONDENTS' ACTIONS IN PETITIONER'S FOURTEENTH AMENDMENT CLAIM.

The Court of Appeals for the Sixth Circuit found in the case below that although there was a genuine factual dispute as to whether an emergency existed on Petitioner's property, this factual issue was immaterial to Petitioner's constitutional claims. Petition at App. 16. In his continued attempt to equate the possibility of an incorrect determination of an emergency with a constitutional violation, Petitioner concludes that the Court of Appeals decision "gives government officials the sole and final word for determining the factual predicates for denials of life, liberty or property under the due process clauses . . . " and that the Court of Appeals decision conflicts with *Waters v. Churchill*. Petition at 15. However,

Petitioner's sweeping statement itself conflicts with *Waters*; *Waters* is clearly inapplicable to the case at hand.

In *Waters v. Churchill*, 114 S. Ct. 1878 (1994), Churchill, a public employee, was fired allegedly because of statements she made to a co-worker. Churchill filed a 42 U.S.C. §1983 action alleging that the firing violated her First Amendment guarantee to free speech. The critical issue in *Waters* was the actual content of the statements Churchill allegedly made in light of two conflicting versions of her statements. Churchill's position was that the appropriateness of the decision about her termination should be based on actual facts of her statements as determined by the finder of fact. The employers, on the other hand, argued that the appropriateness of their decision should be gauged by the facts they, the employers, had relied upon in the termination decision.

Justice O'Connor, in *Waters*, states that even when decision makers have special expertise and special needs, deference to their decisions has never been complete. *Waters*, 114 S. Ct. at 1889. The Court's plurality opinion continues that "employer decisionmaking will not be unduly burdened by having the courts look to the facts as the employer *reasonably* found them to be." *Id.* (emphasis in original). Under *Waters*, a predeprivation process and reasonable inquiry standard has been adopted in First Amendment free speech cases.

In contrast, Petitioner's claim involves the Fourteenth Amendment Due Process Clause and the correctness of a decision which, under well-established law, may be adequately addressed by a postdeprivation process.

Petitioner correctly acknowledges that in cases of emergencies requiring urgent action, officials may deprive persons of rights protected under the Fifth and Fourteenth Amendments without predeprivation process. Petition at 15. *See also, Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950); *North American Cold Storage v. Chicago,* 211 U.S. 306 (1908); and *Parratt v. Taylor,* 451 U.S. 527 (1981). However, as indicated in *Waters,* the provision of an adequate process does not create a constitutional guarantee of a correct decision, but rather "the only protection . . . the Constitution gives . . . is a right to adequate procedure." *Waters,* 114 S. Ct. at 1890.

In a case such as Petitioner's, a postdeprivation process or procedure is an adequate constitutional safeguard because "extraordinary situations where some valid governmental interest is at stake . . . justifies postponing the hearing until after the event." *United States v. Good Real Property,* 114 S. Ct. 492, 503 (1993), *quoting Fuentes v. Shevin,* 407 U.S. 67, 80-81 (1972), *quoting Boddie v. Connecticut,* 401 U.S. 371, 379 (1971) and *citing United States v. $8,850,* 461 U.S. 555, 562 (1983). Whether there should be an exception to the predeprivation hearing depends on balance of 1) the private interest affected, 2) the risk of erroneous deprivation through the procedure used and 3) the governmental interest involved. *Id.* at 503, *citing Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Section 190.705 of the City of Akron, Ohio Code of Ordinances codifies the *Mathews v. Eldridge* balance with respect to emergency demolition of unsafe buildings or structures. While Section 190.705 provides the procedure by which unsafe structures may be razed when those structures threaten the safety and welfare of the people,

Petitioner below never challenged the procedure established by §190.705.

Instead, Petitioner claims a constitutional infringement because of the possibility that Respondents' decision to raze his building was incorrect.[1] The correctness of Respondents' decision may be a legitimate issue for Petitioner to raise, but it is not a legitimate issue for this Court to consider as a constitutional question. The Court in *Waters* reaffirmed that while a person may "challenge the substantive accuracy of . . . conclusions under . . . some state statute or common-law cause of action . . . this protection is not mandated by the Constitution". *Waters*, 114 S. Ct. at 1890. The Court of Appeals pointed to Ohio's inverse condemnation action as the method to determine the accuracy of Respondents' decision. Petition at App. 18. A state court in Ohio, and not the United States Supreme Court, is the appropriate forum for Petitioner's claim that the decision to raze his building was factually in error.

Although Petitioner relies on *Waters v. Churchill* to bolster his argument that this Court should examine the correctness of Respondents' decision to raze his building, such reliance is unwarranted. *Waters* involves the examination of a predeprivation process in a First Amendment claim while Petitioner's case involves a Fourteenth

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[1] The demolition recommendation was made by Chief Building Inspector, John Hymes; Greg Burgoon, Building Inspection Superintendent made the actual decision to conduct an emergency demolition of the structure.

Amendment due process claim in which a postdeprivation process is adequate. *Waters* held only that an official's decision which may subsequently infringe on First Amendment rights must be "reasonable". *Waters*, 114 S. Ct. at 1889. *Waters* does not directly, or by implication, address a procedural due process claim where postdeprivation process is constitutionally all that is due. To examine Respondents' decision to raze Petitioner's building under a *Waters* "reasonableness" standard would be to stretch the *Waters* decision beyond its very parameters. For this reason, this Court should not grant the Petition for Writ of Certiorari.

II. THE DECISION BELOW RAISES NO IMPORTANT ISSUES OF FEDERAL LAW AS TO THE NEED FOR A REASONABLE BASIS TO DISPENSE WITH PROCEDURAL SAFEGUARDS.

Petitioner apparently contends that there are no circumstances under which a postdeprivation hearing constitutes due process. Although Petitioner articulates that postdeprivation remedies, even adequate ones, may be available, such remedies "leave fundamental rights at risk". Petition at 20. This position indeed would be a radical departure from long established precedent and one which is not called into question by the *Waters* case. It is not disputed that the Due Process Clause of the Fourteenth Amendment generally contemplates some type of hearing prior to a state's deprivation of an individual's liberty or property. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Parratt v. Taylor*, 451 U.S. 527 (1981). However, as this Court has repeatedly determined, the "postponement of the judicial inquiry is not a denial of due process,

if the opportunity given for ultimate judicial determination of liability is adequate". *Parratt v. Taylor*, 451 U.S. 527, 540; *Mitchel v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Zinermon v. Burch*, 494 U.S. 113, 128; *United States v. Good Real Property*, 114 S. Ct. 492, 503 (1993).

Respondents wholeheartedly support Petitioner's statement that judicial scrutiny of the actions of state officials, faced with the necessity of quick action, be available. Petitioner below never challenged the procedure set forth in City of Akron, Ohio Code of Ordinances §190.705. Notwithstanding Petitioner's failure to challenge §190.705, Respondents' actions under §190.705 are subject to judicial scrutiny in state court proceedings which are available to Petitioner.

Respondents would not argue that the issue of post-deprivation judicial scrutiny of the state's action is an important one; rather Respondents only need point out that the issue has been and remains well settled. No procedural safeguards have been dispensed with because Petitioner received all the process that was due him. Respondents' actions were in fact reasonable and the judicial review confirming those actions properly must take place first in state court.

III. THIS CASE RAISES NO IMPORTANT ISSUE OF FEDERAL LAW REGARDING THE ADEQUACY OF OHIO'S INVERSE CONDEMNATION ACTION.

Petitioner apparently does acknowledge that there are situations where the need for quick action may necessitate the state taking action to deprive a person of

property prior to a hearing. Petition at 15. Petitioner has contended that Respondents erred in the decision to demolish his building as an emergency pursuant to Code of Ordinance Akron, Ohio §190.705. Petitioner, however, never challenged City of Akron, Ohio Code of Ordinances §190.705; rather, Petitioner maintained throughout that Respondents' conclusions were wrong. This inquiry is precisely that which may be made in the state court proceeding in inverse condemnation.[2] *Solly v. City of Toledo*, 7 Ohio St. 2d 16, 218 N.E. 2d 463 (Ohio, 1966).

Contrary to Petitioner's present assertion, the Court of Appeals for the Sixth Circuit did not ignore an argument that Petitioner contends was made that Respondents have "absolute statutory immunity in state damage suits of the type petitioner had". Petition at 21. Respondents have not argued in this litigation that Respondent would be statutorily immune from an action in inverse condemnation. It was Respondents' position that Petitioner's First Amended Complaint may have attempted to articulate a state tort claim for negligent or intentional infliction of emotional harm within Petitioner's federal lawsuit. As the opinion of the Court of Appeals makes clear, this case has a tortured procedural history. Petition at App. 20-21. After Respondents filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment, Petitioner was permitted to file a Second Amended Complaint. The Magistrate Judge issued a Report and Recommendations considering Respondents' Motion which was filed in response to Petitioner's First

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[2] In fact, Petitioner has now filed an action in state court asserting a number of state law claims.

Amended Complaint. In that Report, the Magistrate found that Petitioner's Second Amended Complaint did not contain a derivative state tort claim and further that the issue of Ohio Revised Code Chapter 2744 political subdivision immunity was rendered moot. Petition at App. 41. Perhaps more importantly, the Magistrate Judge concluded that Petitioner did have an adequate state law remedy. Petition at App. 34-35. Petitioner filed no objections to the Report and Recommendation of the Magistrate Judge. Therefore, as Petitioner did not file objections to the Magistrate Judge's determination that an adequate state remedy existed or that the issue of tort immunity contained in Ohio Revised Code Chapter 2744 was moot, Petitioner has waived such arguments on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985).

Without regard to Petitioner's failure to preserve his arguments, the fact remains that Petitioner did have an adequate state law remedy in inverse condemnation. Respondents did not assert that Respondents would be immune from such actions, nor could they. By its very nature, an action in inverse condemnation arises from the constitution and is not dependent on a traditional state tort cause of action. Article I, §19 of the Ohio Constitution provides that:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a

> compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const. 1802, Art VIII, §4.)

Respondents' authority to act, under Respondents' unchallenged emergency demolition ordinance, derives from the fact that there was an emergency. Petitioner had not filed an action in state court to challenge Respondents' authority to act under the emergency. Respondents have never claimed that, if their decision that emergency abatement was necessarily proved to be incorrect, Petitioner might not be entitled to compensation. Petitioner below claimed that an action in inverse condemnation is lengthy and speculative and, because it is brought as a mandamus, it is an extraordinary action. However, the Court of Appeals for the Sixth Circuit and other federal courts in Ohio have recognized the adequacy of Ohio's inverse condemnation remedy in a taking context. Petition at App. 18; *Silver v. Franklin Tp. Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992); *Triomphe Investors v. City of Northwood*, 835 F. Supp. 1036 (N.D. Ohio 1993). Finally, notwithstanding the fact that Respondents did not raise Ohio Revised Code Chapter 2744 political subdivision tort immunity as a bar to an inverse condemnation claim, this issue has not been decided in Ohio state courts and therefore, this Court should refrain from review of this issue.

Petitioner is correct that at the time the Ohio Supreme Court had left open the issue of governmental immunity in suits against the governmental entity for demolition of a building. Petition at 21-22. In fact, the

Court chose not to consider the question. "Also, Toledo has not raised any questions as to governmental immunity. Hence we express no opinion on such question". *Solly*, 218 N.E. 2d 463, 466. Nonetheless, Petitioner has pointed to no case, either herein or below, which has decided the impact, if any, of Ohio Revised Code Chapter 2744 on an action for inverse condemnation.[3] Therefore, this Court should decline to grant review of an issue of unsettled state law which, according to Petitioner, at best may be "relevant" to Petitioner's due process claim. Petition at 23, footnote 9.

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[3] Ohio Revised Code 2744.09 expressly does not apply to claims based on alleged violations of the United States Constitution:

> §2744.09 Actions and claims exempted from provisions.
>
> This chapter does not apply to, and shall not be construed to apply to, the following:
>
> . . . (E) Civil claims based upon alleged violations of the constitution or statutes of the United States,. . . .

CONCLUSION

Petitioner has failed to show any basis for this Court to grant review. The decision of the Court of Appeals for the Sixth Circuit is consistent with applicable law and does not warrant review. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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This Reply Brief is submitted by petitioner in response to Part III of respondents' Brief in Opposition to Petition for Writ of Certiorari in which respondents argue that the issue of the adequacy of Ohio's inverse condemnation remedy does not involve an important issue of federal law.

In the second question presented for review, petitioner asked this Court to review whether a state inverse condemnation suit may be an adequate postdeprivation remedy for purposes of a procedural due process claim when the state grants political subdivisions an immunity from such suits.

In their Brief in Opposition, respondents state that they "have not argued *in this litigation*" that political subdivisions in Ohio have a statutory immunity from inverse condemnation claims, *see* Brief in Opposition 11 (emphasis added), and they argue that this Court should not review this case because of the presence of an unsettled issue of Ohio law as to the availability of an immunity. Brief in Opposition 13-14.

Although respondents did not expressly refer to "inverse condemnation" claims in arguing for immunity from state tort claims, there is no suggestion in their submissions to the lower courts that the state constitutional origin of the inverse condemnation remedy might yield a different conclusion about the availability of an immunity.[1]

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[1] Respondents have not conceded that they are not entitled to absolute immunity for inverse condemnation claims, but they have carefully argued only that Ohio Revised Code 2744, the

Petitioner recognizes that the availability of an immunity for political subdivisions in inverse condemnation claims is an open issue in Ohio, *see Solly v. City of Toledo*, 218 N.E.2d 463 (Ohio 1966), and acknowledged this. *See* Petition 21-22. Nonetheless, petitioner reiterates its position that the court of appeals failed to consider the availability and significance of this potential immunity when it concluded that petitioner had an adequate post-deprivation remedy in the form of an inverse condemnation suit and affirmed the dismissal of petitioner's procedural due process claim.

In arguing that petitioner has not presented an important issue of federal law, respondents rely on the fact that Ohio law is unsettled, but petitioner obviously is not asking this Court to resolve an unsettled issue of state law. Nonetheless, because the meaning of state law is relevant to the disposition of petitioner's procedural due process claim, the failure of the court of appeals to address this issue raises a substantial federal issue.[2]

Political Subdivision Tort Liability Act, is not applicable to constitutionally-based inverse condemnation claims. Thus, it can be expected that respondents will attempt to interpose an immunity defense in any state court litigation raising an inverse condemnation claim.

[2] The court of appeals discussed the state inverse condemnation remedy in the context of a taking claim that was not a subject of the appeal. Nonetheless, there is no reason to assume that this discussion was not equally applicable to the adequacy of petitioner's postdeprivation remedies for purposes of the procedural due process claim that was before the court of appeals.

The question of the *adequacy* of the state inverse condemnation remedy is clearly a federal issue, and the courts below treated the state remedy as adequate despite respondents' earlier effort to argue for immunity. The fact that respondents are now arguing (for the first time in this litigation) that the state constitutional origin of the inverse condemnation remedy alters this issue should not be a basis for denying certiorari. Rather, this new argument provides further support for the suggestion made by petitioner that pursuant to S.Ct. Rule 16.1 this Court should grant the petition and remand this case to the court of appeals for further proceedings. In those proceedings, the court of appeals can address the availability of an immunity to political subdivisions in inverse condemnation actions and the adequacy of this remedy.[3]

Despite the apparent ambiguity of Ohio law, this case raises an important issue involving the proper approach for determining the availability and adequacy of state postdeprivation remedies. It is petitioner's position that where, as in the present case, there is substantial uncertainty as to the availability of an inverse condemnation remedy, the lower federal courts should determine the meaning of state law themselves or through some other device, be it abstention or certification, obtain an authoritative ruling as to the meaning of state law.

---

[3] As noted in the Petition for a Writ of Certiorari, Ohio provides a method by which federal courts may certify unclear issues of state law to the Ohio Supreme Court. *See* Ohio Supreme Court Rules of Practice, Rule XVI.

With respect to respondents' waiver argument, petitioner acknowledges that he did not seek further review of the decision of the magistrate judge dismissing his fifth amendment taking claim. Petitioner, however, was *successful* before the magistrate judge on his §1983 procedural due process claim, *see* App. 35-38, although the magistrate judge had treated the inverse condemnation claim as adequate for purposes of the taking claim. App. 33-35. Given the posture of the case at the district court level, there was no reason for petitioner, the prevailing party before the magistrate judge, to file an objection on the issue of the adequacy of the state postdeprivation remedy. In any case, the court of appeals concluded that the state postdeprivation remedies were adequate for purposes of the procedural due process inquiry. App. 16. Thus, it is difficult to see how there was any waiver of the adequacy issue, and the effort of respondents to argue waiver seems designed only to muddy the waters and deter this Court from reviewing this case.

CONCLUSION

As stated in the petition for a writ of certiorari, pursuant to S.Ct. Rule 16.1 this Court should grant the petition for a writ of certiorari and vacate and remand the judgment and opinion of the court of appeals for further proceedings in light of *Waters v. Churchill*, 114 S.Ct. 1878 (1994). Additionally, in any remand, this Court should order the court of appeals to determine the adequacy of the state inverse condemnation remedy in light of the unsettled nature of Ohio law. Alternatively, this Court

should grant the petition for a writ of certiorari to review the judgment and opinion of the court of appeals.

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